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Constitutional Law - First Amendment - Content  
Neutrality [*Young v. American Mini Theatres, Inc.*, 427  
U.S. 50, *petition for rehearing denied*, 429 U.S. 873  
(1976)]

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# Case Notes

## CONSTITUTIONAL LAW—FIRST AMENDMENT—CONTENT NEUTRALITY

*Young v. American Mini Theatres, Inc.*,  
427 U.S. 50, petition for rehearing denied, 429 U.S. 873 (1976).

### I. INTRODUCTION

When the city of Detroit restricted the location of movie theaters solely on the basis of the content of their films, the owners of certain "adult" theaters were surprised to discover that the first amendment and Voltaire himself<sup>1</sup> offered them no protection. In *Young v. American Mini Theatres, Inc.*<sup>2</sup> the Supreme Court upheld the city's effort to prevent a concentration of pornography creating a "skid row." Although the practical impact of Supreme Court opinions is considered negligible in some areas,<sup>3</sup> municipal land-use planners have been quick to make use of the Court's decision in *Young*. Indianapolis, Los Angeles, Des Moines, New York City, Portland (Oregon), Kansas City (Missouri), and Fairfax County (Virginia), have all passed, or are considering, laws similar to the Detroit zoning ordinance.<sup>4</sup>

The Anti-Skid Row Ordinance<sup>5</sup> challenged by the respondents in *Young* required, *inter alia*, that adult theaters be more than 1,000 feet apart from other such theaters and other "regulated uses."<sup>6</sup> A theater was "adult" if the content of the movies shown was "characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.'"<sup>7</sup> These activities

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1. "Referring to a suggestion that the violent overthrow of tyranny might be legitimate, . . . [Voltaire remarked:] 'I disapprove of what you say, but I will defend to the death your right to say it.' " *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63, petition for rehearing denied, 429 U.S. 873 (1976). See note 49 *infra* and accompanying text.

2. 427 U.S. 50.

3. For example, the impact of the Supreme Court's decisions in the criminal justice area have been described as having the same effect upon the crime rate as "gamma rays." L. LEVY, *AGAINST THE LAW, THE NIXON COURT AND CRIMINAL JUSTICE* 3 (1974).

4. N.Y. Times, Nov. 28, 1976, § 1, at 1, col. 1.

5. 427 U.S. at 54.

6. DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.0100 (1962). The other uses, listed in § 66.0000, include adult book stores, group "D" cabarets, any bar or restaurant serving liquor, hotels or motels, pawnshops, pool halls, shoeshine parlors, secondhand stores, and taxi dance halls. 427 U.S. at 52 n.3.

7. 427 U.S. at 53. DETROIT, MICH., ORDINANCE 742-G (1972).

and areas were set out in sufficient detail to make the city council blush.<sup>8</sup>

The respondents asserted the invalidity of the ordinance upon three grounds: first, that it was unconstitutionally vague in violation of the due process clause of the fourteenth amendment; second, that it constituted an impermissible prior restraint upon first amendment expression; and third, that the classification of theaters solely by film content violated the fourteenth amendment's mandate for equal protection of the laws.<sup>9</sup> The district court granted summary judgment in favor of the city,<sup>10</sup> but the Court of Appeals for the Sixth Circuit reversed.<sup>11</sup> Judge Lively, for the Court of Appeals, relied on the third ground, and required a compelling state interest to justify the city's content-based classification—an interest which he found lacking.<sup>12</sup>

Reversing the court of appeals, Justice Stevens wrote for a four member plurality and purported to establish a lower standard of protection for "erotic materials" which would permit content distinctions as the basis for regulation as long as the "record discloses a factual basis for . . . [achieving] the desired effect."<sup>13</sup> The fifth vote for reversal was supplied by Justice Powell whose special concurrence did not accept the plurality's view, but proceeded instead upon what might be labeled a zoning theory.<sup>14</sup> Justice Powell reasoned that since the city's intention was not to suppress expression, and since the infringement of free expression was only incidental, no special justification was necessary for the content regulation imposed by the ordinance. All four dissenters joined in the two dissenting opinions. Justice Stewart answered the plurality by asserting that content distinctions were

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8. The Court presented these items in a footnote:

"For the purposes of this Section, 'Specified Sexual Activities' is defined as:

"1. Human Genitals in a state of sexual stimulation or arousal;  
"2. Acts of human masturbation, sexual intercourse or sodomy;  
"3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast

"And 'Specified Anatomical Areas' is defined as:

"1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

"2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

427 U.S. at 53 n.4.

9. *Id.* at 58.

10. *Nortown Theatre, Inc. v. Gribbs*, 373 F. Supp. 363 (E.D. Mich. 1974).

11. *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975).

12. *Id.* at 1019.

13. 427 U.S. at 71. Joining Justice Stevens' opinion were Justices Rehnquist and White, and Chief Justice Burger. Justice Powell joined only parts I and II. *Id.* at 51.

14. *Id.* at 73 (Powell, J., concurring).

simply not permissible under the first amendment,<sup>15</sup> and that the recent decision in *Erznoznik v. City of Jacksonville*<sup>16</sup> required affirmance.<sup>17</sup> Justice Blackmun's dissent further urged that the ordinance was fatally vague, since a theater owner could not know whether his films were sufficiently "characterized by an emphasis" on the activities and anatomical areas described in the statute.<sup>18</sup>

A crucial aspect of the *Young* decision is that the speech covered by the statute is admittedly not obscene,<sup>19</sup> and is, therefore, protected by the first amendment. Presented with a claimed violation of the first amendment, a court must look to the content of the speech to determine whether it is protected by the first amendment. Once it is established that the first amendment does protect the expression, a state may impose reasonable restrictions on the time, place, and manner of the speech in order to further legitimate state interests.<sup>20</sup> However, the first amendment severely limits the ability of the state to base those time, place, and manner restrictions solely on the content of the protected speech.<sup>21</sup> This is the doctrine of content neutrality. If this doctrine means that after the initial determination (to see if the expression is inside or outside the area protected by the first amendment) no content distinctions can be made, then the Detroit ordinance regulating theaters based on the content of their films appears to present a classic instance of discriminatory treatment of protected expression, and the *Young* decision, upholding the statute, is a "drastic departure from established principles of first amendment law."<sup>22</sup>

This Note analyzes the reasoning used by both the plurality and Justice Powell. Special emphasis is placed on the notion of content neutrality in the regulation of first amendment expression—how it developed, how it has been used by the Court, and how it should apply to the facts of *Young*. Emphasis will also be placed on Justice Powell's zoning theory and its implications for future conflicts between land-use regulations and assertions of individual liberty.

## II. THE DECISION

Parts I and II of Justice Stevens' opinion are the "majority" opinion in *Young*, because Justice Powell joined in both of them while

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15. *Id.* at 85-86 (Stewart, J., dissenting).

16. 422 U.S. 205 (1975).

17. 427 U.S. at 88 (Stewart, J., dissenting).

18. *Id.* at 89 (Blackmun, J., dissenting).

19. *Id.* at 85 n.3 (Stewart, J., dissenting).

20. See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

21. *Id.* See notes 86-122 *infra* and accompanying text.

22. 427 U.S. at 84 (Stewart, J., dissenting).

not joining in Part III. Parts I and II dealt with the respondents' first two challenges, vagueness and prior restraint.<sup>23</sup>

The vagueness argument was treated first. Justice Stevens found no need to consider the "abstract" validity of this claim since, even if vague as to some, the ordinance was "unquestionably applicable to these respondents."<sup>24</sup> Therefore, he concluded, the respondents had no standing to assert vagueness.

In the past, however, because of the potential chilling of first amendment expression by an overly broad regulatory ordinance, the Court has allowed a party clearly covered by an ordinance to assert its infirmity on behalf of others.<sup>25</sup> To invoke what Justice Stevens calls "[t]his exception from traditional rules of standing,"<sup>26</sup> the plaintiff must show a deterrent effect that is "both real and substantial" upon "legitimate expression,"<sup>27</sup> and that the statute is not "'readily subject to a narrowing construction by the state courts.'" <sup>28</sup> Justice Stevens found no "real and substantial" deterrence, not because there was no chilling effect, but because the speech was "on the border line between pornography and artistic expression."<sup>29</sup> Therefore, there was a "less vital interest" in protecting this speech and the deterrence of legitimate expression was not significant.<sup>30</sup> Moreover, the majority could "see no reason why the statute was not 'readily subject to a narrowing construction by the state courts.'" <sup>31</sup>

The next basis of the respondents' argument, that the ordinance was an invalid prior restraint on protected speech, was disposed of in less than two pages. Leaving to one side the issue of content neutrality, a city clearly has the power to impose "[r]easonable regulations of the time, place, and manner of protected speech."<sup>32</sup> Within this power, Detroit was able to require all theaters to be licensed, and even the 1,000 foot restriction, if applied to all theaters, would not "in itself, create an impermissible restraint on protected communication."<sup>33</sup> Thus, the locational requirements would not invalidate the ordinance unless it was invalid for regulating location solely on the basis of film content.

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23. See text accompanying note 9 *supra*.

24. 427 U.S. at 59.

25. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

26. 427 U.S. at 59-60.

27. *Id.* at 60.

28. *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)).

29. 427 U.S. at 61.

30. *Id.*

31. *Id.*

32. *Id.* at 63 n.18.

33. *Id.* at 62.

Finally, Justice Stevens turned to the question of whether regulations which distinguished theaters solely by the content of their films were violative of the equal protection clause of the fourteenth amendment. This section of the opinion, which Justice Powell did not join, began by quoting Voltaire: "I disapprove of what you say, but I will defend to the death your right to say it."<sup>34</sup> This remark characterizes the high regard of American society and the Supreme Court for "the principle that the government may not tell the citizen what he may or may not say."<sup>35</sup> The opinion also acknowledged and cited broad language in support of respondents' position that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>36</sup>

Despite this language, Justice Stevens insisted that the "actual adjudications" of the Court show that "the stated principle that there may be no restriction whatever on expressive activity because of its content"<sup>37</sup> is not absolute. First of all, the determination whether a given expression is to receive the protection of the first amendment at all requires an examination of the content of that expression. Thus, the plurality recognized that speech involving incitation to crime,<sup>38</sup> incitation to violence by "fighting words,"<sup>39</sup> and publication in time of war of "the number and location of troops"<sup>40</sup> is not protected by the first amendment.

Secondly, "[e]ven within the area of *protected* speech, a difference in content may require a different governmental response."<sup>41</sup> As examples, the plurality noted that content distinctions are permissible in cases involving libel,<sup>42</sup> commercial speech,<sup>43</sup> political advertising

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34. *Id.* at 63.

35. *Id.*

36. *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972).

37. 427 U.S. at 65-66.

38. *E.g.*, *Bond v. Floyd*, 385 U.S. 116, 133-34 (1966).

39. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

40. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

41. 427 U.S. at 65-66 (emphasis added):

42. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The requirements for newspaper libel differ according to the content of the defamatory statement, such as whether the subject was a public official. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See generally* Collins & Drushal, *The Reaction of State Courts to Gertz v. Robert Welch Inc.*, 28 CASE W. RES. L. REV. 306 (1978).

43. Justice Stevens asserted, despite the recent decision of *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (purporting to put to rest the notion that commercial speech could be less protected than other speech), that not *all* advertisements would be protected, and the determination regarding protection would depend upon content.

on a public rapid transit system,<sup>44</sup> statements by employers to their employees,<sup>45</sup> and, "[m]ore directly in point,"<sup>46</sup> erotic materials of an obscene nature when distributed to juveniles.<sup>47</sup>

Justice Stevens next turned to whether such content regulation could be imposed upon American Mini Theatres and its co-respondents:<sup>48</sup>

. . . even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.<sup>49</sup>

Having established this less rigorous standard of protection for erotic speech, Justice Stevens went on to agree with the district court that "[t]he record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect,"<sup>50</sup> and thus the challenged zoning ordinance "does not violate the Equal Protection Clause of the Fourteenth Amendment."<sup>51</sup>

While the issue of content neutrality in the regulation of protected speech was the principal question presented by *Young* (and the focus of both Justice Stevens' opinion and Justice Stewart's dissent), Justice Powell contributed a theory "sufficiently different"<sup>52</sup> to allow him to reach the same result without joining in Part III of the plurality opinion. The ordinance must be upheld, he stated, since it is no more than an "innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."<sup>53</sup>

In a footnote, Justice Powell declared that it was unnecessary to

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44. *E.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

45. *E.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

46. 427 U.S. at 69.

47. *Ginsberg v. New York*, 390 U.S. 629 (1968).

48. Co-respondents with American Mini Theatres, Inc., were Pussy Cat Theatres of Michigan, Inc. and Nortown Theatre, Inc.

49. 427 U.S. at 70.

50. *Id.* at 71.

51. *Id.* at 72-73.

52. *Id.* at 73 (Powell, J., concurring).

53. *Id.*

decide whether distinctions based on content are permissible for erotic, though nonobscene, materials. He added, however, that he is not "inclined to agree with . . . the holding in Part III (and supporting discussion)." <sup>54</sup> After summarizing some of the Court's decisions broadly sustaining zoning ordinances as "an accepted necessity in our increasingly urbanized society," <sup>55</sup> Justice Powell asserted that the question before the Court in *Young* was a "unique situation . . . [which] calls, as cases in this area so often do, for a careful inquiry into the competing concerns of the State and the interest protected by the guarantee of free expression." <sup>56</sup>

In pursuing that inquiry, Justice Powell employed the four-part test developed by the Court in *United States v. O'Brien* <sup>57</sup> to determine the validity of governmental regulations which, in regulating non-communicative conduct, incidentally regulate communicative conduct. Such a law will be upheld, despite the incidental infringement on first amendment rights,

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest. <sup>58</sup>

Although Justice Powell noted that there are "factual distinctions between a prosecution for destruction of a Selective Service registration certificate, as in *O'Brien*, and this case," <sup>59</sup> he applied the test because "the essential weighing and balancing of competing interests are the same." <sup>60</sup>

Under the *O'Brien* standard the restriction on speech must be "incidental" and not direct. "The primary concern of the free speech guarantee . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey." <sup>61</sup> Thus, if the Detroit ordinance did not restrict the film makers in terms of content, nor affect their ability to make the films publicly available, and if the ordinance did not restrict "in any significant way" the ability of the public to view those films, then the infringement on first amendment

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54. *Id.* n.1.

55. *Id.* at 74.

56. *Id.* at 76.

57. 391 U.S. 367 (1968).

58. 427 U.S. at 79-80 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)) (Powell, J., concurring).

59. 427 U.S. at 80 (Powell, J., concurring).

60. *Id.*

61. *Id.* at 76-77.



liberty was incidental.<sup>62</sup> Justice Powell found that none of these restrictions were significant in *Young*; therefore the free flow of protected speech was only incidentally impaired. Next, Justice Powell found that the zoning ordinance was undoubtedly within the power of the city of Detroit, and that the city's interest in the stability of its neighborhoods was "both important and substantial."<sup>63</sup> The purpose of the restriction was not to "suppress" these films but to prevent a deleterious effect on the neighborhood. "Nor is there reason to question that the degree of incidental encroachment upon such expression was the minimum necessary to further the purpose of the ordinance."<sup>64</sup> The four parts of the test, therefore, were satisfied by the Detroit zoning plan.

In the fourth and final part of his concurring opinion,<sup>65</sup> Justice Powell addressed the reliance of the dissenters upon the 1975 case of *Erznoznik v. City of Jacksonville*.<sup>66</sup> *Erznoznik* involved an ordinance which banned the showing of films containing nudity by drive-in theaters whose screens were visible from the street. The Court struck down the Jacksonville ordinance, but Justice Powell, who authored the majority opinion in *Erznoznik*, distinguished it from the facts in *Young* by pointing out that the Jacksonville ordinance purported to prevent a nuisance—it was not a zoning ordinance.<sup>67</sup> The Jacksonville ordinance was found to be overly broad because it prohibited "the showing of any nudity, however innocent or educational."<sup>68</sup> The ordinance struck down in *Erznoznik* "was a misconceived attempt directly to regulate content of expression,"<sup>69</sup> unlike the Detroit ordinance, it was not an incidental restriction.

Justice Stewart was joined by Justices Brennan, Marshall, and Blackmun in a dissenting opinion which characterized the majority decision as "an aberration."<sup>70</sup> The dissenters stated flatly that the doctrine of content neutrality required invalidation of the ordinance: "By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place and manner regulations that affect protected expression be content-neutral except in the limited context of a captive

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62. *Id.*

63. *Id.* at 80.

64. *Id.* at 81-82.

65. This part of the opinion is erroneously labelled "III" in the unbound Official Reporter. *Id.* at 83.

66. 422 U.S. 205 (1975).

67. 427 U.S. at 83 (Powell, J., concurring).

68. *Id.*

69. *Id.* at 84.

70. *Id.* at 87 (Stewart, J., dissenting).

or juvenile audience."<sup>71</sup> The opinion also rejected Justice Stevens' "marching our sons and daughters off to war" standard of protection, arguing that it was precisely because few of us would go to war to protect the speech regulated by the ordinance that the speech should have the "full protection of the Constitution."<sup>72</sup>

All the dissenters joined in a second dissenting opinion written by Justice Blackmun. Justice Blackmun criticized the plurality's refusal to grant the petitioners' standing to urge that the ordinance was unconstitutionally vague on its face.<sup>73</sup> He maintained that the Detroit ordinance was fatally vague because the regulated speech was cryptically defined as films whose content is "characterized by an emphasis" on particular anatomical areas or activities.<sup>74</sup> Furthermore, to determine if he complied with the ordinance, a theater operator had to ascertain whether there were two other regulated uses within 1,000 feet of his operation.<sup>75</sup> Justice Blackmun also contended that other elements of the ordinance—the broad discretion vested in the mayor concerning the licensing of "adult" theaters, and the discretion vested in the mayor and the City Planning Commission regarding waivers of the ordinance—were unconstitutionally overbroad.<sup>76</sup>

### III. CONTENT NEUTRALITY, THE FIRST AMENDMENT, AND EQUAL PROTECTION

#### A. *The Development of the Doctrine*

The central issue presented in *Young* is whether, and to what extent, a state can regulate protected expression solely on the basis of its content. The notion that regulations must be content neutral was stated as virtually an absolute principle by Justice Stewart in his dissent,<sup>77</sup> while the four members of the plurality appear to accept without question the propriety of content distinctions. A look at the development of this principle is helpful in deciding whether this rule is as rigid and absolute, or as flexible and qualified, as the two sides claim.

As with many rigid rules of first amendment law, the concept of content neutrality was first appreciated and articulated by Justice Black, well known for his unusual belief that the first amendment's

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71. *Id.* at 85-86.

72. *Id.* at 86.

73. *Id.* at 94-96 (Blackmun, J., dissenting).

74. *Id.* at 89.

75. *Id.* at 89-90.

76. *Id.* at 91-92.

77. *Id.* at 86 (Stewart, J., dissenting).

phrase "no law"<sup>78</sup> meant "no law."<sup>79</sup> One of Justice Black's early opinions reflecting this theme dealt with the permissibility of certain picketing under the National Labor Relations Act.<sup>80</sup> Congress had included a provision in the Act which was interpreted by Justice Black to forbid picketing "only when the picketers express particular views." For Justice Black, such a distinction based upon the content of the message necessarily violated the first amendment.<sup>81</sup> When the Court upheld city ordinances prohibiting demonstrations on public streets, Justice Black reconciled this with his absolute position on free speech, stating that the ordinances were intended to regulate *conduct*, and that the infringement on free expression was merely incidental; moreover, the burden was on the municipality to show that the reasons behind the ordinances "outweighed" the incidental infringement of first amendment rights.<sup>82</sup> He insisted, however, that even such incidental infringements could not discriminate on the basis of content: "[T]hose cases never intimated that we would uphold as constitutional an ordinance which purported to rest upon the power of a city to regulate traffic but which was aimed at speech or attempted to regulate the content of speech."<sup>83</sup>

Justice Black wrote for the Court in *Adderly v. Florida*,<sup>84</sup> upholding the state's denial of a particular location for a civil rights protest, since there was

not a shred of evidence in this record that this power was exercised . . . because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds for any purpose. . . . The United States Constitu-

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78. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

79. *See Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring); *American Communications Ass'n v. Douds*, 339 U.S. 382, 445 (1950) (Black, J., dissenting).

80. *NLRB v. Fruit Packers Local 760*, 377 U.S. 58, 76, 79 (1964) (Black, J., concurring) (construing 29 U.S.C. § 158(b)(4)(ii)(B) (1970)).

81. *Id.* Dissenting from a 1961 decision which held that the California Board of Bar Examiners could constitutionally deny admission to an applicant who had refused to answer questions regarding his previous involvement with the Communist Party, Justice Black rejected the proposition that the first amendment right could be balanced against competing interests: "I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting).

82. 366 U.S. at 69 (Black, J., dissenting).

83. *Id.* Justice Black was referring to "*Schneider v. State*; *Cox v. New Hampshire*; *Prince v. Massachusetts*; and *Kovacs v. Cooper*." *Id.* at 69 n.27 (citations omitted).

84. 385 U.S. 39 (1966).

tion does not forbid a State to control the use of its own property for its own lawful nondiscriminatory [content neutral] purpose.<sup>85</sup>

The landmark decision for the principle of content neutrality was handed down after Justice Black had left the Court. It was Justice Marshall's opinion in *Police Department of Chicago v. Mosley*<sup>86</sup> which introduced the famous language quoted by Justice Stevens in *Young* that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>87</sup> In *Mosley*, a lone and admittedly peaceful picketer patrolled the public sidewalk adjoining a Chicago high school carrying a sign which read: "Jones High School practices black discrimination. Jones High School has a black quota."<sup>88</sup> The Chicago ordinance challenged by Mosley proscribed all picketing of schools except for peaceful picketing during a labor dispute, an ordinance clearly not content neutral. Justice Marshall's opinion held the Chicago ordinance unconstitutional because it restricted speech on the basis of content.<sup>89</sup> However, in contrast to Justice Black's unequivocal statements in *Adderly*, Justice Marshall qualified his application of the neutrality requirement by acknowledging that the state could legitimately prohibit picketing, in appropriate circumstances, in order "to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized."<sup>90</sup> The equal protection analysis of the six-member majority in *Mosley* subjected the Chicago ordinance to the rigorous test of strict scrutiny<sup>91</sup>—a test it failed to pass. Though the interest of the city was substantial, the classification was not sufficiently tailored to that interest, and could not be supported merely by an "undifferentiated fear or apprehension of disturbance."<sup>92</sup>

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85. *Id.* at 47-48 (footnotes omitted).

86. 408 U.S. 92 (1972).

87. *Id.* at 95.

88. *Id.* at 93.

89. *Id.* at 99-102.

90. *Id.* at 98-99.

91. The majority stated that "we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment," 408 U.S. at 94-95, and found that the equal protection and the first amendment interests were "closely intertwined." *Id.* at 95. Justice Blackmun and Justice Rehnquist concurred in the result without opinion. Chief Justice Burger concurred in a one-paragraph opinion noting that the government could still censor speech in the familiar, unprotected areas of obscenity, *Roth v. United States*, 354 U.S. 476 (1957); "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); and libel, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). None of the concurring Justices took exception to the strict scrutiny standard applied by the majority.

92. 408 U.S. at 101 (quoting *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1969)).

*Mosley* was hailed by Professor Karst as a "landmark first amendment decision [in which the] Court has explicitly adopted the principle of equal liberty of expression."<sup>93</sup> Professor Karst did not ignore the qualification of the principle in *Mosley*; he recognized that although "absolute equality is a practical impossibility [t]he principle requires courts to start from the assumption that all speakers and all points of view are entitled to a hearing, and permits deviation from this basic assumption only upon a showing of substantial necessity."<sup>94</sup> Thus, *Mosley*, the case most often cited for the requirement of content neutrality,<sup>95</sup> did not create an absolute ban on content distinctions, but rather raised a presumption against their validity by requiring them to survive a strict scrutiny analysis.

One of the chief cases employing the equal liberty standard articulated in *Mosley* was the case relied upon by the *Young* dissenters—*Erznoznik v. City of Jacksonville*.<sup>96</sup> The appellant in *Erznoznik*, the manager of a drive-in theater, challenged a Jacksonville, Florida ordinance which prohibited the showing of any movie containing nudity<sup>97</sup> by outdoor or drive-in theaters with screens "visible from any public street or public place."<sup>98</sup> Justice Powell delivered the opinion of the Court, which struck down the statute as invalid on its face.<sup>99</sup>

In considering the justification for the statute proffered by the city, that the ordinance was intended to eliminate a nuisance,<sup>100</sup> Justice Powell, citing *Mosley*, explained that "when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."<sup>101</sup> The city had regulated nonobscene speech solely on the basis of content and had created a restraint on free expression.<sup>102</sup> As a result, the "limited

93. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975).

94. *Id.*

95. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 303, 311 (1974) (Brennan, J., dissenting); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 129, 130 (1973); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16, 34 (1973).

96. 422 U.S. 205 (1975).

97. The film contained "female buttocks and bare breasts." 422 U.S. at 206. The particular movie involved was "Class of '74" which had been rated "R" by the Motion Picture Association of America. *Id.* at 206 n.1.

98. *Id.* at 207.

99. *Id.* at 215-217.

100. The city also justified the ordinance as protective of juveniles, and as a traffic regulation. The Court found the total ban on nudity overinclusive as to the first justification, *id.* at 212-14, and underinclusive as to the second. *Id.* at 214-15.

101. *Id.* at 209.

102. *Id.* at 211 n.8.

privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content."<sup>103</sup> Although requiring more justification than the city supplied, this somewhat obscure standard used in *Erznoznik* for justifying content distinctions is apparently not as stringent as the strict scrutiny standard of *Mosley*. Interestingly, this part of the *Erznoznik* opinion does not mention the equal protection clause. Rather, in analyzing the concerns of the first amendment, Justice Powell balanced the competing interests of the state and the individual—a technique of which he is particularly enamored.<sup>104</sup>

Although the standard of *Erznoznik* is less exacting than the standard used in *Mosley*, there still remains a presumption of invalidity when content distinctions are made, and any ordinance making such distinctions must "satisfy the rigorous constitutional standards that apply when government attempts to regulate expression."<sup>105</sup> Even so, a presumption of invalidity is not an absolute prohibition. Therefore, Justice Stewart's insistence, in his *Young* dissent, that the regulation *must* be content neutral would be difficult to understand were it not for one other recent Supreme Court decision. On March 3, 1976, three weeks prior to the oral argument in *Young*, the Court handed down its decision in *Hudgens v. NLRB*.<sup>106</sup> The dispute in *Hudgens* arose when labor picketers picketing the retail store of their employer were ejected from a private shopping mall. Justice Stewart himself wrote for a majority faced with the task of reconciling two ostensibly inconsistent opinions dealing with the availability of first amendment rights in a private shopping complex.<sup>107</sup>

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103. *Id.* at 212.

104. See Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1023-26, 1029-32 (1972).

105. 422 U.S. at 217. The Chief Justice's response in dissent was: "The First Amendment interests involved in this case are trivial at best." *Id.* at 223 (Burger, J., dissenting). Justice Rehnquist joined in that opinion.

106. 424 U.S. 507 (1976).

107. Although the first amendment, through the fourteenth amendment, prohibits *state* infringement on free speech, the guarantee does not necessarily prevent infringement of free speech by *private* individuals. The first extension of first amendment rights on private property came in *Marsh v. Alabama*, 326 U.S. 501 (1946), in which all of the property of Chickasaw, Alabama was owned by the Gulf Shipbuilding Company, including the streets and street corners, sidewalks, parks, and similar public places. According to the Court these places are "historically associated with the exercise of First Amendment rights." *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968). In such circumstances, where the town was the functional equivalent of a state municipality, denial of first amendment rights was impermissible state action under the fourteenth amendment. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 918-23 (9th ed. 1975).

In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,<sup>108</sup> the Court had held that a private shopping center could not, consistent with the first amendment, prevent the picketing of one of its stores since the private center was the functional equivalent of a public business district.<sup>109</sup> In *Lloyd Corp. v. Tanner*,<sup>110</sup> the Court rejected the first amendment claim of young people barred from distributing anti-war leaflets in a shopping mall. The Court distinguished *Logan Valley* because the anti-war leaflets were not directly related to the activities of a particular store within the mall.<sup>111</sup>

Such a distinction, of course, depends upon the content of the message to be conveyed. That, for Justice Stewart, was impermissible; although *Lloyd* purported to distinguish *Logan Valley* based on the content of the message, in fact "the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*."<sup>112</sup> Criticizing the reasoning used in *Lloyd* to distinguish it from *Logan Valley*, Justice Stewart, writing for the Court in *Hudgens*, stated that

while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes . . . and may even forbid altogether such use of some of its facilities . . . , what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression . . . .<sup>113</sup>

Justice Stewart concluded that since the first amendment did not prohibit the ejection of anti-war demonstrators from a shopping center in *Lloyd*, it should not prohibit the expulsion of labor demonstrators from a shopping center in *Hudgens*; the two situations could be distinguished only on the basis of the content of the demonstrators' expression which would be impermissible under the first amendment.

The balancing test Justice Powell used in *Lloyd*, taking into account the connection between the message and the businesses in the shopping center,<sup>114</sup> was incompatible with Justice Stewart's absolute

108. 391 U.S. 308 (1968).

109. *Id.* at 318.

110. 407 U.S. 551 (1972).

111. *Id.* at 563. In *Logan Valley*, the Court noted it was not called upon to decide the validity of picketing which was not directly related to activities on the property. 391 U.S. at 320 n.9.

112. 424 U.S. at 518.

113. *Id.* at 520 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)) (emphasis in original).

114. Justice Powell balanced the first amendment interests of the protesters with the private property interests of the mall owner. Because the message was totally unrelated to the business activity of the shopping center, it was less important for the protest to

view of the ban on content distinctions.<sup>115</sup> Therefore, Justice Stewart's dissent in *Young* is consistent with his majority opinion in *Hudgens*. In contrast, despite the fact that Justice Powell's balancing test was being overruled, he joined the majority opinion in *Hudgens*—not simply in the result—as did two of the *Young* plurality, Chief Justice Burger and Justice Rehnquist.<sup>116</sup>

The dissenters in *Hudgens*, Justices Marshall and Brennan, were willing to permit content distinctions by private property owners rather than reject all first amendment claims, but still maintained the position that the principle of content neutrality was "unquestionably applicable" where "it was clearly the government that was acting."<sup>117</sup> Thus, in March of 1976, seven Justices agreed that the government simply could not regulate expression on the basis of its content.

Although the doctrine of content neutrality has had an unsettled development, by the time *Young v. American Mini Theatres* came before the Court, the principle was thought to require, if not absolute neutrality, at least a substantial burden of justification upon the regulating government.<sup>118</sup> The "presumptive unconstitutionality of content discriminations"<sup>119</sup> was overcome in some cases, but the Court considered them to be clearly defined exceptions to the general rule.<sup>120</sup> In light of this precedent, the Court in *Young* could have justifiably rejected Justice Stewart's absolute position, and, recogniz-

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take place in the center, as opposed to nearby public streets and sidewalks. 407 U.S. at 564. It is noteworthy that *Mosley* and *Lloyd* were decided only four days apart; the former forbade content distinctions in the public forum while the latter employed content distinctions and balanced the interests in a private shopping center. "*Lloyd Corp. and Mosley . . . produce this extraordinary result: a labor-picketing exception in an ordinance is unconstitutional, but in a 'private' shopping center a labor-picketing exception is constitutionally required. The nation deserves better than this, and the first amendment's equality principle demands better.*" Karst, *supra* note 93, at 41. *Hudgens* appears to have resolved this problem by transforming *Lloyd*, from the balance it purported to strike, to an outright overruling of *Logan Valley*.

115. Justice Stewart has elsewhere demonstrated an appreciation for an absolute and inflexible rule in constitutional adjudication. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (concurring opinion) and *Loving v. Virginia*, 388 U.S. 1, 13 (1967) (concurring opinion) (states may under no circumstances make the criminality of an act depend on the color of the actor's skin).

116. Justice Stevens did not participate in *Hudgens*; Justice White concurred in the result, 424 U.S. 507, 524 (1976).

117. *Id.* at 541.

118. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 324 (1970); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

119. Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 255 (1976).

120. "Such selective restrictions [content distinctions] have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it



ing the presumptive unconstitutionality of the Detroit ordinance, applied the strict scrutiny equal protection analysis of *Mosley*<sup>121</sup> or the "rigorous" balancing of *Erznoznik*.<sup>122</sup> However, Justice Stevens and the plurality went much further.

B. *Equal Protection, "Not to Mention  
the First Amendment Itself"*<sup>123</sup>

In *Young*, the Court stated that the respondents' position on the question of content neutrality was "that the classification of theaters on the basis of the content of their exhibitions violates the Equal Protection Clause of the Fourteenth Amendment."<sup>124</sup> However, in neither the plurality opinion of Justice Stevens nor the concurrence of Justice Powell is there any express articulation of the "traditional" equal protection analysis which perennially plagues law students.

The equal protection clause of the fourteenth amendment<sup>125</sup> has, in recent years, become the focus of a great deal of legal analysis and debate.<sup>126</sup> Traditionally, the Court has evaluated legislative classifications, such as Detroit's classification of adult theaters, by examining the state goals or purposes behind the challenged statute. Where the Court has found a legitimate state objective, the burden is on the state to show that the classification is truly a means to the intended result. In most instances, this burden is rather small; the Court requires only that there be some "rational relation" between the means chosen and its intended effect.<sup>127</sup> Stated in its most deferential form, "the

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impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. City of Jacksonville*, 422 U.S. at 209 (citing *Rowan v. Post Office Dept.*, 397 U.S. 729 (1970) (where the speaker intruded on the privacy of the home), and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (where the captive audience could not avoid unwilling exposure)).

121. See text accompanying notes 90-92 *supra*.

122. See text accompanying note 105 *supra*.

123. *Police Dept. v. Mosley*, 408 U.S. 92, 96 (1972).

124. 427 U.S. at 58.

125. No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV.

126. See, e.g., Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973).

127. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning ordinance distinguishing between families and unrelated residents upheld as reasonable and rationally related to a permissible state objective); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969) (legislative omission of unsentenced prisoners from absentee ballot provisions held not violative of equal protection clause since classification bore rational relationship to legitimate state end); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)

constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."<sup>128</sup>

In some instances, however, the legislative classification will be viewed with "strict scrutiny," requiring a high degree of means-ends congruence.<sup>129</sup> As Justice Powell once wrote, "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny."<sup>130</sup> The difficult issues which arise from this branch of equal protection doctrine are first, what are sensitive and fundamental personal rights, and second, what does strict scrutiny entail.<sup>131</sup>

The rights traditionally protected by strict scrutiny are those which maintain the integrity of the political process (through which a legislature's classifications might be changed), and those which protect "insular minorities" from discrimination by the states.<sup>132</sup> Thus, rights in "the area of economics and social welfare" have been excluded from strict equal protection scrutiny,<sup>133</sup> while political and civil rights have not. Notably, "[i]n the area of First Amendment liberties, the modern Court has imposed very substantial restraints on state ac-

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(legislation regulating optical industry held constitutional as rational means to legitimate state goal).

128. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

129. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944).

130. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

131. The traditional "two tier" equal protection analysis is not a hard-and-fast rule of law; it is a means of explaining the process by which the Court has deferred to state legislative classifications in some cases, and overturned such classifications in others. *See Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). Justice Marshall has been particularly antagonistic toward the "all or nothing" nature of judicial review under this model. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (Marshall, J., dissenting). Professor Gunther has suggested that a "newer equal protection" is evolving, by which the Court applies what he calls "minimum scrutiny with bite." *See generally* Gunther, *supra* note 126. Under this approach, the Court ostensibly applies the deferential "mere rationality" standard of review, and yet puts the state to the task of showing that the legislature actually intended to achieve the legitimate state interests which are asserted. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976); *McGinnis v. Royster*, 410 U.S. 263 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

The plurality opinion in *Young* did not employ this "middle level" standard of review—Justice Stevens adhered to the "mere rationality" standard of review when he found that "[t]he record discloses a factual basis for the Common Council's conclusion that [the Detroit zoning ordinance] will have the desired effect. It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in certain areas." 427 U.S. at 71.

132. *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

133. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

tion”<sup>134</sup> by means of strict scrutiny analysis. When that analysis is implemented, it requires that the classification be very closely tailored to the state objective, that the state’s interest be compelling, and that there be no reasonable, alternative means available which would have a less onerous impact on fundamental rights.<sup>135</sup>

The respondents’ equal protection theory in *Young*, as stated by the Court,<sup>136</sup> was simply that the equal protection clause of the fourteenth amendment prohibited any content discrimination. That argument proves too much, however, because “[t]he Constitution does not require that things different in fact be treated in law as though they were the same.”<sup>137</sup> Even strict scrutiny analysis does not mean that a state may *never* intrude upon a fundamental right; it means only that the state must do so in a manner which shows the utmost deference to that right.<sup>138</sup> In *Young* there is a very high degree of congruence between the classification and its stated objective. The evidence provided by the city showed that these movie theaters, and not others, caused legitimate businesses to leave the area, thereby creating a “skid row.”<sup>139</sup> The distinction between adult theaters and other theaters was entirely appropriate to achieve the city’s goal. There was no contention by the respondents or the dissenting Justices that the classification was either underinclusive or overinclusive.<sup>140</sup> Given this level of congruence between means and ends, the equal protection analysis should have been simple. Since “[t]he rights guaranteed by the First Amendment are recognized as among the most fundamental rights possessed by a free people,”<sup>141</sup> the Detroit ordinance should have been strictly scrutinized, requiring a compelling state interest and a showing that the method chosen was the least onerous means available to achieve that end. Both lower courts did precisely that. The district court found that “the preservation of neighborhoods, upon which adult establishments have a destructive impact” was a state interest sufficiently compelling

134. G. GUNTHER, *supra* note 107, at 595.

135. See *American Mini Theatres v. Gribbs*, 518 F.2d 1014, 1019-20 (6th Cir. 1975). See generally Comment, *supra* note 126.

136. 427 U.S. at 58.

137. *Id.* at 668 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1939)).

138. It is true that few government classifications survive such scrutiny, but it has been done. See *Korematsu v. United States*, 323 U.S. 214 (1944); *DeFunis v. Odegaard*, 82 Wash.2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974).

139. 427 U.S. at 55. See Note, 54 TEX. L. REV. 422 n.2 (1976).

140. For a presentation of these concepts, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). As Judge Celebrezze pointed out when *Young* was before the Sixth Circuit Court of Appeals, a similar regulation covering all theaters would probably be impermissibly overinclusive. 518 F.2d at 1025.

141. *Id.* at 1019.

to meet the strict standard.<sup>142</sup> Judge Lively, writing for the circuit court, did not disturb that finding, but found that the city had not met its burden of showing that this method was the most appropriate means of promoting that interest.<sup>143</sup> The Supreme Court, however, did not engage in this analysis. Justice Stevens only mentioned the equal protection clause when he stated the issue and the holding.<sup>144</sup>

All three courts failed to recognize that the equal protection clause is only secondarily related to content based regulations of protected expression. Such regulations strike primarily, and most fundamentally, at the free speech guarantee of the first amendment. The government has the power to impose "[r]easonable regulations of the time, place and manner of protected speech,"<sup>145</sup> but singling out a particular message to bear an extra burden is the essence of governmental censorship, and such censorship strikes at the heart of the first amendment. There are understandable reasons why the courts would overlook the first amendment issue and use equal protection analysis instead. The notion of "discrimination" based on content evokes equal protection concepts simply as a matter of language. Also, the Supreme Court's use of equal protection analysis in *Mosley* might mislead a court into losing sight of the first amendment interests affected. Finally, it is possible that confusing first amendment and equal protection issues will not affect the outcome of any particular case. The test ultimately applied under strict scrutiny requires a compelling interest to justify the state regulation, no matter how well the classification is tailored to its goal. The equal protection determination of compelling interest would possibly be coextensive with the first amendment determination that a state justification has met the "rigorous constitutional standards"<sup>146</sup> it faces when regulating speech.

Nevertheless, the Court in *Young* had an opportunity to end this confusion and to state the proper standard in terms of the first amendment. It should have pointed out that of all the content neutrality cases only *Mosley* was chiefly an equal protection case; that the *Mosley* "opinion speaks chiefly to first amendment values and primarily cites first amendment cases as authority,"<sup>147</sup> and that the Court in *Mosley*

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142. 373 F. Supp. 363, 369 (E.D. Mich. 1974).

143. 518 F.2d at 1020.

144. 427 U.S. at 63, 72-73. Justice Stevens deferred to the judgment of the Detroit City Council, holding that the zoning ordinance was rationally related to "the city's interest in preserving the character of its neighborhoods." *Id.* at 71.

145. *Id.* at 63 n.18.

146. 422 U.S. at 217.

147. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 27 (1975).

acknowledged that "the equal protection claim in this case is closely intertwined with First Amendment interests."<sup>148</sup> The Court should have stated that the threshold inquiry with regard to a content discriminatory regulation is whether there is a state justification substantial enough to satisfy the requirements of the first amendment. Then, and only then, should the classification be subjected to equal protection analysis. It is understandable that a court faced with a clear equal protection violation might never reach the first amendment inquiry,<sup>149</sup> but it must be recognized conceptually that the first amendment inquiry is the initial one.<sup>150</sup>

### C. *The Plurality: Part III*

Having passed up the opportunity to clarify the relationship between the first amendment and the equal protection clause, Justice Stevens went on to establish why "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."<sup>151</sup> It is in Part III of the opinion that Justice Stevens purported to show that the admittedly protected expression of the Pussycat Theatres was not what Voltaire had in mind.<sup>152</sup>

It is important to analyze the authority offered by Justice Stevens, especially since the dissenting opinions did not do so.<sup>153</sup> The first group of cases Stevens discussed dealt with *unprotected* speech.<sup>154</sup> These cases, dealing with speech which incites to crime, and the "fighting comment,"<sup>155</sup> are irrelevant to the inquiry in *Young*, since

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148. 408 U.S. at 95.

149. For example, the justification offered by the City of Jacksonville in *Erznoznik*, that the ordinance protected minors, failed because a majority of the Court found the classification was clearly overinclusive since it included innocent nudity such as "baby's buttocks." 422 U.S. at 213.

150. It should be noted that the respondents did not make this mistake. They clearly stated that the Detroit content regulation violated the "First and Fourteenth Amendments," Brief for Respondents American Mini Theatres, Inc., and Pussycat Theatres of Michigan, Inc., at 65, *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and that the regulations were "Violative Of The First Amendment . . . And Repugnant To The Equal Protection Clause." Brief for Respondent Nortown Theatre, Inc. at 40, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Justice Stevens, however, framed the issue solely in equal protection terms. 427 U.S. at 58, 63.

151. 427 U.S. at 61.

152. *Id.* at 70. See note 1 *supra*.

153. Justice Stewart, responding to Part III, chiefly refuted the ability of the government to distinguish sexual materials without a determination of obscenity. *Id.* at 87. Justice Blackmun addressed only the issue of vagueness. *Id.* at 88.

154. See notes 38-40 *supra* and accompanying text.

155. See notes 38-40 *supra*.

the movies at issue were admittedly protected expression.<sup>156</sup> No analogy is drawn from these cases; they are simply offered as examples of a proper governmental content distinction affecting speech. But until the Court holds that all speech falls within the protection of the first amendment, defining that which does not must inevitably require a look to its content. Such cases say nothing about whether, once protection is granted, it may be removed or restricted solely because of the content of the expression.

Justice Stevens then offered further examples ostensibly within the area of protected speech where content neutrality was not required. Some of these examples, however, were cases dealing not with protected speech, but with unprotected speech granted limited protection in order to prevent a chilling of first amendment rights. Libel has never been subject to first amendment protection, and the newspaper cases cited by Justice Stevens merely afford some protection to libelous (and therefore unprotected) speech to prevent that chilling effect.<sup>157</sup>

Likewise, deceptive or false speech is not protected speech, and Justice Stevens' references to commercial speech seriously misused the Court's recent decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>158</sup> In that case, Justice Blackmun was careful to point out that prohibitions on false or misleading advertising were valid because "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."<sup>159</sup> Otherwise, *Virginia State Board* put an end to the notion that commercial speech was to receive different protection than other speech.<sup>160</sup> Thus, the statement by Justice Stevens that that case "held that the First Amendment affords *some* protection to commercial speech" is unduly misleading.<sup>161</sup> After *Virginia State Board*, examining the content of commercial speech, like examining allegedly obscene speech, is for the purpose of determining whether that speech is within the protection of the first amendment at all.

Similarly, the limits on the statements of an employer during a labor dispute cannot accurately be described as content regulation of protected speech. Employers are forbidden to make statements which

156. 427 U.S. at 85 n.3 (Stewart, J., dissenting).

157. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

158. 425 U.S. 748 (1976).

159. *Id.* at 771.

160. The Court stated that the "purely economic" interest of the advertiser "hardly disqualifies him from protection under the First Amendment." *Id.* at 762.

161. 427 U.S. at 68 (emphasis added).

contain a "threat of reprisal or force or promise of benefit."<sup>162</sup> A threat or a promise is an *act*, albeit a communicative act, which is essentially analogous to incitation to crime. Words are often the means of performing acts which are censured by the government; such verbal acts are subject to penalties not only in labor disputes, but also in other areas Justice Stevens did not mention. Words may comprise the tort of assault,<sup>163</sup> or intentional infliction of emotional distress.<sup>164</sup> In the law of contracts, if words induce reasonable reliance in another, the speaker incurs liability. The plurality failed to recognize that the law often penalizes the result brought about by a communication. The law proscribes the threat, the assault, the deceit—it could even proscribe causing the ruin of a neighborhood—without implicating first amendment concerns. However, when the government "punishes only spoken words,"<sup>165</sup> it violates the first amendment.

Two of the cases Justice Stevens cited, however, did approve content based regulations of protected speech. Government prohibitions on the sale of obscene materials to minors are valid though such materials admittedly are not obscene for adults.<sup>166</sup> The special treatment of juveniles under the first amendment has long been recognized as a unique exception, due to the presumed inability of the juvenile mind to choose objectively in the marketplace of ideas.<sup>167</sup> Justice Stewart's dissent in *Young* specifically excepted communication to juvenile audiences from his absolute position of content neutrality.<sup>168</sup> Justice Stevens offered no explanation why this narrow exception would make the rule of content neutrality inapplicable in *Young*.

The other example of a discriminatory content regulation proffered by Justice Stevens, and recognized as an exception by Justice Stewart in his dissent,<sup>169</sup> was *Lehman v. City of Shaker Heights*.<sup>170</sup> *Lehman*, like *Young*, was a 4-1-4 opinion, but it has been cited almost exclusively for the theory of Justice Douglas' concurring opinion.<sup>171</sup>

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162. *Id.* at 68-69 n.31 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

163. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 40 (4th ed. 1971).

164. *Id.* at 56.

165. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

166. *Ginsberg v. New York*, 390 U.S. 629 (1968).

167. The Michigan Supreme Court banned the showing of erotic drive-in movies (on facts quite similar to those in *Erznoznik*) because "the moving pictures shown were not fit to be seen by children below 18 years of age." *Bloss v. Paris Township*, 380 Mich. 466, 469, 157 N.W.2d 260, 261 (1968).

168. 427 U.S. at 86 (Stewart, J., dissenting).

169. *Id.*

170. 418 U.S. 298 (1974).

171. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977).

Justice Douglas maintained that a municipality could shield the captive audience on its rapid transit cars from the intrusion of political advertising.<sup>172</sup> Again, Justice Stevens made no effort to analogize this precedent to the facts in *Young*, nor did he urge that this exception justifies an exception in *Young*. Rather, these two exceptions and the other inapposite cases were cited, apparently to show that the rule of content neutrality does not truly exist. Justice Stevens seemed to reason that because content distinctions are made so often, they surely can be made when "few of us would march our sons and daughters off to war to preserve"<sup>173</sup> the speech in question. Such was the case, he maintained, in *Young*.

This analysis creates a new class of less protected speech encompassing erotic materials. Erotic materials may be found obscene, and, if so, they may be banned without implicating the first amendment. If not obscene, they will be free from "total suppression," but such materials may be regulated solely on the basis of content if they are "erotic materials that have some arguably artistic value."<sup>174</sup> This must be taken as the plurality's first amendment standard; any equal protection or due process problems are solved if there is "a factual basis for the . . . conclusion that this kind of restriction will have the desired effect."<sup>175</sup>

The insensitivity in Part III of *Young* to some of the most fundamental assumptions about freedom of expression is unsettling. Even though these movies were admittedly protected by the first amendment, Justice Stevens categorized them as outside the realm of "ideas of social and political significance."<sup>176</sup> Neither the philosophy of freedom of expression nor prior Supreme Court decisions lend the slightest credence to such a narrow view of what the Constitution protects. Forgotten, or at least ignored, was Justice Holmes' warning that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."<sup>177</sup>

The inference in the plurality opinion is that erotic expression is simply not an "opinion" or an "idea" within the meaning of Justice Holmes' statement. Such a distinction is often made to justify the exclusion of obscenity from first amendment protection; the argument

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172. 418 U.S. at 307 (Douglas, J., concurring).

173. 427 U.S. at 70.

174. *Id.*

175. *Id.* at 71.

176. *Id.* at 61.

177. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *Accord*, *Terminiello v. Chicago*, 337 U.S. 1 (1949).



is that obscenity appeals not to the mind, but to the "elemental passions."<sup>178</sup> Justice Rehnquist made a similar argument in his dissent in *Virginia State Board*,<sup>179</sup> describing most commercial speech as having "no ideological content."<sup>180</sup> Whatever the validity of this distinction in determining the protection or lack of protection for erotic and commercial speech,<sup>181</sup> the force of the argument greatly diminishes when it has been determined that the speech at issue *is* protected. As the late Justice Harlan wrote, once the expression is deemed protected, it must be recognized that

much linguistic expression serves a dual communicative function . . . . In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message to be communicated.<sup>182</sup>

Justice Harlan's position is in keeping with the traditional view that protected speech, besides simply relating an ideology, has among its purposes "to convince, to induce desired behavior in another, to describe, to direct, to entertain or amuse, to investigate, analyze or plan."<sup>183</sup> The plurality offers no reason beyond *ipse dixit* why Voltaire (or the Constitution) would take a narrower view.

There is little doubt that prior to *Young* the Supreme Court afforded films the same protection as any other form of expression.<sup>184</sup> In Part III of *Young*, however,

[t]he plurality's suggestion that the degree of First Amendment protection depends upon our willingness to "march our sons and daughters off to war" is the equivalent of subjecting First Amendment rights to a popular vote. There is hardly a case in which this Court has struck down governmental attempts to suppress First Amendment rights in which the Court could not have found the citizenry largely

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178. Clor, *Obscenity and the First Amendment: Round Three*, 7 LOY. L.A.L. REV. 207, 211 (1974).

179. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

180. *Id.* at 790.

181. See generally Finnis, "Reason and Passion:" *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967).

182. *Cohen v. California*, 403 U.S. 15, 26 (1971).

183. *Baker, Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6 (1976).

184. See, e.g., *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). It is interesting to note that in *Young* Justice Stevens quoted from *Mosley* saying the government must be neutral not only as to message and ideas, but also as to "subject matter" and "content." 427 U.S. at 64 (quoting *Police Dept. v. Mosley*, 408 U.S. at 95). Chief Justice Burger joined Justice Stevens' opinion in

unwilling to fight for what the speaker had to say. Indeed, it is obvious that the protection of the First Amendment is needed only in those instances in which the subject matter of speech is offensive to the community at large.<sup>185</sup>

The benefit of free thought and discussion in all areas, and upon all subjects, enriches society as a whole, not simply isolated individuals.<sup>186</sup> It is wrong to suppress expression thought to be false or evil because we can never be certain it is false (unless we claim infallibility),<sup>187</sup> and also because even false ideas are needed to challenge the true belief lest the latter become "a dead dogma, not a living truth."<sup>188</sup> A society committed to freedom of expression cannot support the plurality rule in *Young*. The first amendment should mean that the majority may not impose upon the minority the type of value judgments underlying the plurality opinion. The conclusion reached by the plurality is particularly dangerous to free expression because it allows a majority of the Court to remove from first amendment protection speech which they do not find socially or politically "significant." When the life tenured bench can determine the bounds of free expression by means of such a highly subjective standard, there is truly "no readily ascertainable general principle for stopping short"<sup>189</sup> of government censorship of unpopular ideas.

#### IV. CONTENT NEUTRALITY AND ZONING

Since joining the Court in 1971, Justice Powell has been recognized for his ability to view cases before the Court in different, and

*Young*, yet he used this very language in his dissent in *Erznoznik* to support the proposition that the Jacksonville ordinance, while "regulating the content of a certain type of display, . . . is not a restriction of any 'message,'" and is therefore proper. 422 U.S. at 223.

185. Respondents' Petition for Rehearing at 2, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

186. One hundred and twenty years ago, a great proponent of freedom of expression encountered a similar attitude regarding *religious* freedom in a British official who felt that religious toleration

"meant complete liberty to all freedom of worship, *among Christians, who worshipped upon the same foundation*. It meant toleration of all sects and denominations of *Christians* . . . ." I desire to call attention to the fact that a man who has been deemed fit to fill a high office in the government of this country . . . , maintains the doctrine that all who do not believe in the divinity of Christ are beyond the pale of [religious] toleration. Who, after this imbecile display, can indulge the illusion that religious persecution has passed away. . . .

J.S. MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 122 n.1 (E. P. Dutton ed. 1951).

187. *See id.* at 104-05.

188. *Id.* at 126. Virtue which is never tempted is weak indeed. *See* S. CLEMENS, *The Man That Corrupted Hadleyburg*, in *THE MAN THAT CORRUPTED HADLEYBURG AND OTHER STORIES AND ESSAYS* (1902).

189. *Cohen v. California*, 403 U.S. 15, 25 (1971).

usually insightful terms. Somewhat in emulation of Justice Harlan, Justice Powell's separate opinions often clarify or limit the opinion of the Court, or offer an alternative theory for decision.<sup>190</sup> His concurring opinion in *Young*, immediately following Part III of the plurality opinion, would appear to fit admirably into this category. However, the problems with his analysis<sup>191</sup> are so severe that the memory of Justice Harlan is evoked in form only.

The concurring opinion began by describing *Young* as a case of first impression in which the Court could not "mechanically apply the doctrines developed in other contexts."<sup>192</sup> The effect of the opinion, however, was to mechanically apply the test developed in *United States v. O'Brien*,<sup>193</sup> which was admittedly out of context.<sup>194</sup> The substantial "factual distinctions" between *O'Brien* and *Young*, which Justice Powell purported to recognize and then ignored, made the *O'Brien* test inapplicable. In *O'Brien*, the destruction of a Selective Service registration card was, in the words of Chief Justice Warren, "conduct having no connection with speech. . . . [T]here is nothing necessarily expressive about such conduct."<sup>195</sup> The Court observed that the government imposed sanctions for wilfully destroying registration cards solely to prevent harm "to the smooth and efficient functioning of the Selective Service System."<sup>196</sup> Chief Justice Warren pointed out that "[t]he case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."<sup>197</sup>

The activity in *Young*, however, did not combine speech and nonspeech elements. The regulated movies in *Young* were "pure" speech, if that term has any meaning at all; *O'Brien* was convicted solely for the "noncommunicative impact of his conduct."<sup>198</sup> Because of the dual nature of *O'Brien's* conduct, unlike the conduct of the respondents in *Young*, the government's regulation of conduct incidentally infringed speech. Essentially, the *O'Brien* test is intended to

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190. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972) (concurring opinion); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (concurring opinion). See generally Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Mr. Justice Powell*, 24 STAN. L. REV. 1001 (1972).

191. See notes 52-76 *supra* and accompanying text.

192. 427 U.S. at 76.

193. 391 U.S. 367 (1968).

194. 427 U.S. at 80.

195. 391 U.S. at 375.

196. *Id.* at 382.

197. *Id.*

198. *Id.*

allow such incidental infringements upon speech if they are made in good faith and in the most limited manner possible.<sup>199</sup> The Detroit ordinance was narrowly tailored to its objective,<sup>200</sup> and, according to Justice Powell, was not intended to suppress the speech itself but rather to remedy the effect of the films on the neighborhoods.<sup>201</sup> In this way, the *O'Brien* test was easily met.

A key problem, however, is Justice Powell's determination that the infringement on speech in *Young* is incidental because the ordinance does not upset the free flow of protected speech from the creator to the consuming public. Apparently borrowing from the labor law concept of alternative channels of communication,<sup>202</sup> Justice Powell asserted that there was no significant harm to first amendment rights as long as the movies would still be produced and the public had alternative means of viewing them.<sup>203</sup> From this proposition one must conclude that the guarantees of the first amendment inhere not in persons but in the speech itself (or only in the original creators of the speech). It requires no extension of this concept to reason that if the government prohibited the passing of handbills urging a particular philosophy on a given street corner, while permitting the passing of handbills espousing the opposite viewpoint, then the restriction on first amendment rights would be only "incidental" as long as there exist alternative means of conveying the message contained in the prohibited handbills. This focus on the free flow of speech rather than on the rights of the individual theater owners to display movies of their choice, was implicitly rejected by Justice Powell himself in *Erznoznik*: he recognized that the "issue here, however, is not the viewing rights of unwilling viewers but rather the rights of *those who operate drive-in theaters* and the public that attends these establishments."<sup>204</sup> Indeed, the biggest analytical hurdle for Justice Powell was the need to reconcile his concurrence in *Young* with his opinion in *Erznoznik*. His terse reply to Justice Stewart's statement that *Erznoznik* is "almost on 'all fours' with this case"<sup>205</sup> was that "[i]t involves nothing of the kind."<sup>206</sup>

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199. See text accompanying note 58 *supra*.

200. See notes 139-41 *supra* and accompanying text.

201. 427 U.S. at 80-81 (Powell, J., concurring).

202. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

203. 427 U.S. at 78-79. This notion finds some extrajudicial support from Alexander Meiklejohn: "What is essential is not that everyone shall speak, but that everything worth saying shall be said." A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

204. 422 U.S. at 211 n.7 (emphasis added).

205. 427 U.S. at 88 (Stewart, J., dissenting).

206. *Id.* at 82 n.6 (Powell, J., concurring).

The respondent in *Erznoznik* offered three justifications for the Jacksonville ordinance. It was Justice Powell's treatment of the first—that the huge display of nude parts of the body viewable from the street was a nuisance to unwilling passers-by—that created the taut parallel to *Young*. The second justification, protection of juveniles, and the third, prevention of traffic accidents, were found overinclusive and underinclusive respectively.<sup>207</sup> Justice Powell's statement in *Young* that the Court in *Erznoznik* had rejected the "first purpose [because] the ordinance was overbroad"<sup>208</sup> is simply inaccurate.<sup>209</sup> The portion of the opinion in *Erznoznik* dealing with nuisance does not speak to overbreadth at all, but rather to the ability of the government, consistent with the first amendment, to make content distinctions in regulating protected speech. Justice Powell concluded that: "[T]he limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content."<sup>210</sup>

Justice Powell undoubtedly felt the need to distinguish *Erznoznik* since its facts appear to fit his *Young* analysis perfectly. The restriction in *Erznoznik* was not total; it was (as he said in *Young*) a "decision . . . to treat certain movie theaters differently because they have markedly different effects upon their surroundings."<sup>211</sup> The Jacksonville ordinance required that certain theaters not locate in a particular place in order to avoid a certain tangible effect, *i.e.*, a nuisance. The Detroit ordinance sought to prevent skid rows. Surely Justice Powell would not suggest that regulating speech because it is a nuisance evinces an intention to suppress free expression based on disagreement with its message. The Court has long recognized the states' ability to curtail expression which constitutes a nuisance,<sup>212</sup> just as it has allowed zoning ordinances.<sup>213</sup> The City of Jacksonville did not attempt to restrict movies containing nudity where it did not create a

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207. See note 100 *supra*.

208. 427 U.S. at 83 (Powell, J., concurring).

209. Overbreadth was the infirmity of the second justification, not the first. "In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible." 422 U.S. at 213.

210. *Id.* at 212. Justice White, dissenting in *Erznoznik*, recognized clearly that the nuisance section (Part II-A) was not decided on the same basis as the juvenile section (Part II-B) and observed that "[i]f, as the Court holds in Part II-B of its opinion, that the ordinance is unconstitutionally overbroad even as an exercise of the police power to protect children, it is fatally overbroad as to the population generally. Part II-A is surplusage." *Id.* at 224 (White, J., dissenting).

211. 427 U.S. at 82 n.6.

212. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

213. See notes 217-31 *infra* and accompanying text.

nuisance, so there was no apparent intent to suppress expression. The ordinance in *Young* was similarly tailored to its specific objective. It cannot be said that the ordinance in *Erznoznik* significantly limited the content choices of the makers of the films, or the audiences who wished to view them. Thus, first amendment rights were affected only incidentally.

In *Erznoznik*, however, Justice Powell showed scrupulous regard for the rights of the Jacksonville drive-in owners and the added monetary burden they faced in complying with the statute.<sup>214</sup> When counsel for American Mini Theatres argued that their client would bear added costs in relocating, Justice Powell replied that "[t]he inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression."<sup>215</sup> The point overlooked is that in terms of the impact on the free flow of expression, the two ordinances are identical. In sum, the first amendment infringement of the Jacksonville ordinance was just as "incidental" and "wholly unrelated to the suppression of any free expression"<sup>216</sup> as was the Detroit ordinance. Both of these laws restricted the freedom of expression having a specific content; the decisions are irreconcilable unless the state has a constitutionally recognized higher interest in effecting its zoning laws than its nuisance laws.

It is significant, therefore, that Justice Powell's opinion begins with a general view of the way in which the Court has "broadly sustained the zoning power of local municipalities."<sup>217</sup> The power of municipalities to pass innovative laws regulating land use has grown enormously in the years since it was first upheld in *Village of Euclid v. Ambler Realty Co.*<sup>218</sup> As Justice Sutherland then stated, such laws "must find their justification in some aspect of the police power, asserted for the public welfare."<sup>219</sup> Today, the definition of the police power invariably used in zoning cases is the one provided by Justice Douglas: "The concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine

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214. 422 U.S. at 211 n.7, 211-12 n.8.

215. 427 U.S. at 78 (Powell, J., concurring).

216. *Id.* at 80-81.

217. *Id.* at 73.

218. 272 U.S. 365 (1926).

219. *Id.* at 387. The relatively modest Euclid ordinance zoned according to the height of buildings and the general use (commercial or residential) of the property. In fact, to the extent that zoning following *Euclid* tried to concentrate particular uses in defined zones, the *Young* ordinance should be called anti-zoning—trying to disperse a zone of adult theatres.

that the community should be beautiful as well as healthy. . . ."<sup>220</sup> Employing such broad language, courts have permitted zoning that prohibits certain architectural designs<sup>221</sup> simply because the designs were "at variance" with the surrounding homes.<sup>222</sup> In *People v. Stover*,<sup>223</sup> the Supreme Court refused to disturb a New York Court of Appeals decision upholding a zoning ordinance of the City of Rye, New York, regulating where property owners could hang their clotheslines. The Supreme Court also upheld the zoning ordinance in *Village of Belle Terre v. Boraas*<sup>224</sup> which provided that only people of the same family could share a house.<sup>225</sup> Clearly, the desire of the City of Detroit to eliminate skid rows, whether for reasons of economics or aesthetics, was within the broad scope of the police power. However, establishing the constitutional power of municipalities to enact such laws without violating the fifth amendment<sup>226</sup> does not end the inquiry when the means chosen are offensive to the first amendment.

Both *Belle Terre* and *Stover* upheld zoning ordinances in the face of first amendment challenges. In *Belle Terre*, unrelated persons wishing to live together brought a freedom of association claim which was rejected by the Court. However, Justice Douglas denied that there actually was a first amendment interest being infringed. He stated that the ordinance "involves no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association."<sup>227</sup> The ordinance was not upheld *despite* a first amendment infringement, as Justice Powell suggested in *Young*, but because there was no such infringement.<sup>228</sup> *Stover* presented the classic *O'Brien* situation in which the proscription of noncommunicative conduct (hanging a clothesline) necessarily infringed communicative conduct (protesting taxes).<sup>229</sup>

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220. *Berman v. Parker*, 348 U.S. 26, 33 (1955) (citation omitted).

221. *Reid v. Architectural Bd.*, 119 Ohio App. 67, 192 N.E.2d 74 (1963).

222. *State ex. rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 271, 69 N.W.2d 217, 222 (1955).

223. 12 N.Y.2d 462, 191 N.E.2d 272, *appeal dismissed*, 375 U.S. 42 (1963).

224. 416 U.S. 1 (1974).

225. The ordinance provided that not more than two persons unrelated by blood or marriage could live together. *Id.* at 2.

226. "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

227. 416 U.S. at 7.

228. Justice Douglas reasoned that the right of unmarried people to live together was not infringed, since two unmarried people could do so without violating the ordinance. Any other association was permissible because the family could "entertain whomever it likes." *Id.* at 8-9. This reasoning is rather conclusory, but it seems that Justice Douglas' main concern was to reaffirm the Court's two-tiered approach to equal protection analysis in the face of the lower court's attempt to use an intermediate standard between "rational relationship" and "strict scrutiny." See Note, *Boraas v. Village of Belle Terre: The New, New Equal Protection*, 72 MICH. L. REV. 508 (1974); note 131 *supra*.

229. The *Stover* case posed a potential complication. The clothesline protest against

Neither of these cases provides a basis for imbuing zoning ordinances with any magical quality in comparison with any other legitimate legislative function. Justice Powell quoted Justice Marshall's dissent in *Belle Terre* to establish that zoning may be "the most essential function performed by local government,"<sup>230</sup> but neglected to continue, as did Justice Marshall, that "deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights."<sup>231</sup>

Historically, expression which constituted "a public nuisance in that privacy interests were being invaded"<sup>232</sup> has been recognized by the Court as one of the "narrowly limited classes of speech"<sup>233</sup> which can be regulated by the states.<sup>234</sup> The major deleterious effect Detroit sought to remedy was the deterioration of neighborhoods that results when surrounding residents and other businesses, offended by adult films and their patrons, respond by moving out. Stated in these terms, the interest the city tried to protect with the zoning ordinance in *Young* is very similar to that which Jacksonville sought to protect in *Erznoznik*.<sup>235</sup>

Justice Powell's analysis makes it clear that Jacksonville could have passed an amendment to its zoning ordinance to prohibit drive-in movies displaying "Specified Sexual Activities" from locating where the screen was visible from the street. Under the concurring opinion in *Young*, the content distinction which failed to be justified by privacy interests would thereby be justified by that essential function called zoning. The difference between the two cases, using Justice Powell's own analysis, is pure taxonomy. The Jacksonville ordinance was "misconceived"<sup>236</sup> only in that it lacked the proper label. Such distinctions are not worthy of differing constitutional interpretations, especially when made by the same author only a year apart. Justice Powell's conclusory and unprecedented finding of an "incidental"

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unreasonable city tax rates had been underway for years, and it appeared that the zoning law was passed in response to the Stovers' protest. Even Justice Powell would perhaps find such action was "using the power to zone as a pretext for suppressing expression." 427 U.S. at 84 (Powell, J., concurring).

230. 427 U.S. at 80 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974)).

231. 416 U.S. at 14.

232. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

233. *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972).

234. *Cohen v. California*, 403 U.S. 15, 21 (1971).

235. Cf. Brief for Respondent Nortown Theatre, Inc., at 56-57, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (both cases involve "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors").

236. 427 U.S. at 84 (Powell, J., concurring).



restriction on first amendment rights, and his inapposite use of the *O'Brien* test, permitted the precise result in *Young* which he claimed he was "not inclined to agree with;" that is, "that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression."<sup>237</sup>

## V. REFLECTIONS ON THE IMPACT OF YOUNG

As mentioned above, many cities are in the process of imitating Detroit's ordinance regulating urban pornography. Many problems, including violent crime, have arisen in cities such as Boston that have employed the opposite approach of concentrating such establishments in a single "combat zone." This makes the Detroit technique even more attractive.<sup>238</sup> The decision in *Young* was certainly reassuring for officials in those cities considering the problem, but the case suggests that overzealous attempts to zone out pornography may be struck down. Part III of Justice Stevens' opinion acknowledged, perhaps grudgingly, that "the First Amendment will not tolerate the total suppression of erotic materials."<sup>239</sup> A city might overstep these bounds if the practical effect of the ordinance was total, or near total, suppression, whatever its motivation. Justice Stevens, in a footnote, stressed the importance of the district court's finding that numerous other locations were available to the respondents, indicating that the "situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."<sup>240</sup> Justice Powell also warned against using zoning as a pretext for regulating speech in an attempt to eliminate pornography.<sup>241</sup> The practical impact of *Young* is that cities must avoid being too effective in curtailing skid rows through zoning ordinances regulating adult movie theaters; they must stop short of totally eliminating these movies.<sup>242</sup>

Despite the magnitude and celerity of the practical impact of *Young*, it is doubtful that the impact within the legal profession and

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237. *Id.* at 73 n.1.

238. *See* N.Y. Times, Nov. 28, 1976, § 1, at 1. col. 1.

239. 427 U.S. at 70.

240. *Id.* at 71 n.35.

241. *Id.* at 84 (Powell, J., concurring). Public statements by city officials describing zoning as a weapon against pornography could perhaps be used as evidence to show zoning was a mere pretext. *See* N.Y. Times, *supra* note 238.

242. It should be noted that the recurring theme in both the plurality and the concurring opinions—that less than total suppression is not as constitutionally suspect as total suppression—has been repeatedly rejected by the Supreme Court. As recently as 1975, the Court reaffirmed that: "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). As Justice Black explained:

upon future constitutional adjudication will be equally significant. It is difficult to conceive of a lower court judge workably applying the plurality's "marching our sons and daughters" test to future cases. The plurality's concept of a middle level of "less protected" speech could be used by prosecutors in obscenity cases as an alternative argument; they could rely upon *Young* and assert that, even if not obscene, such erotic speech may be subject to more stringent, content-based regulation than other speech. Lower courts, however, are not bound to apply Part III of Justice Stevens' opinion, since it did not garner five votes. In addition, state courts have shown a recent tendency to use the state constitution to provide broader safeguards for individual rights than are afforded by the federal constitution under recent Supreme Court decisions.<sup>243</sup>

For these reasons, it is the ostensibly more sophisticated reasoning of Justice Powell which is more likely to have a lasting effect.<sup>244</sup> The severe infirmities of the concurring opinion are not nearly so glaring as those of the plurality. Justice Powell's reasoning is also not as novel as that of the plurality, having been shared by Judge Celebrezze (in dissent) when *Young* was before the Sixth Circuit Court of Appeals.<sup>245</sup> The danger of Justice Powell's opinion is that his reasoning is less

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This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop.

NLRB v. Fruit Packers Local 760, 377 U.S. 58, 80 (1964) (concurring opinion). In addition, the respondents in *Young* pointed out numerous other cases, e.g., *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where regulations or penalties were found to be violative of first amendment freedoms. Brief for Respondents American Mini Theatres, at 67-73, *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

243. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). A recent Massachusetts obscenity case passed up the opportunity to make any use of *Young*. The Supreme Judicial Court applied a rational relationship equal protection test to the obscene speech. The court implied that nonobscene, erotic speech is protected and that the court would limit obscenity statutes burdening protected speech. *Commonwealth v. 707 Main Corp.*,—Mass.—, 357 N.E.2d 753, 758 (1976).

244. In a sharply divided decision a single concurrence can later become the law of the case. Justice Douglas' opinion in *Lehman v. City of Shaker Heights* is a prime example, establishing the captive audience exception to the doctrine of content neutrality. 418 U.S. 298 (1974) (concurring opinion). Another recent example is Justice Blackmun's concurrence in *National League of Cities v. Usery*, 426 U.S. 833 (1976). See, e.g., *Christensen v. Iowa*, 417 F. Supp. 423 (N.D. Iowa 1976), and *Usery v. Bettendorf Community School Dist.*, 423 F. Supp. 637 (S.D. Iowa 1976).

245. *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014, 1021 (1975) (dissenting opinion). Judge Celebrezze's dissent was described by one commentator as "persuasive," see Note, 54 TEXAS L. REV. 422, 428 n.35, but his opinion applied the *O'Brien* test without ever explaining why the infringement was incidental. However, Judge Celebrez-

limited than that of Justice Stevens which, by its terms, deals only with "erotic" materials. Justice Powell's opinion allows content neutrality to be abandoned and permits less than total restrictions on any speech causing undesirable effects. The state interest will be deemed substantial as long as the zoning label applies.<sup>246</sup>

The Court recently delivered a unanimous opinion in *Linmark Associates, Inc. v. Township of Willingboro*<sup>247</sup> which indicates that perhaps neither the reasoning of Justice Powell nor the reasoning of the plurality will have much vitality in analogous cases. The Willingboro ordinance struck down by the Court banned the posting of "for sale" and "sold" signs by homeowners for the stated purpose of stemming white flight from the community.<sup>248</sup> Although the ordinance clearly discriminated on the basis of content, there were other means to communicate the same message, such as newspapers and real estate listings. One would have expected Justice Powell to find that these alternative channels of communication rendered the infringement on speech incidental since the "free access of the public to the expression"<sup>249</sup> was not substantially reduced.

The unanimous opinion authored by Justice Marshall, however, extended the principle of content neutrality to commercial speech, and made no use of Justice Powell's analysis in *Young*.<sup>250</sup> The *Linmark* opinion dealt with the decisions in *Young*, *O'Brien*, *Erznoznik*, and *Mosley* in a single paragraph.<sup>251</sup> Citing to a footnote in the opinion of the plurality in *Young*, Justice Marshall evidently read the case to allow content regulation where "the place or manner of the speech produces a detrimental 'secondary effect' on society."<sup>252</sup> Apparently distinguishing between a focus on the expression and a focus on the theaters, the flight of whites due to the "for sale" signs in *Linmark* was somehow a "primary" effect,<sup>253</sup> while in *Young* the flight of

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ze did have the advantage over Justice Powell of not having authored the opinion in *Erznoznik*.

246. It seems that if *Young* is applied in the future as a zoning case, then the effect of the *Berman-Belle Terre-Young* line of cases will be to give cities nearly plenary power to zone out their troubles.

247. 431 U.S. 85 (1977).

248. *Id.* at 87-88.

249. 427 U.S. at 73 (Powell, J., concurring).

250. The opinion dealt only in passing with *Young*, despite the fact that an incidental restriction analysis similar to Justice Powell's *Young* concurrence was an alternate basis for the holding of the Third Circuit below. *Linmark Associates, Inc. v. Township of Willingboro*, 535 F.2d 786, 794-98 (1976). The statement of Judge Gibbons, in dissent below, applies with equal force to *Young*: "In this case, the shackle upon speech can hardly be dignified as 'incidental.'" *Id.* at 813.

251. 431 U.S. at 93-94.

252. *Id.* at 94 (citing *Young v. American Mini Theatres*, 427 U.S. at 71 n.34).

253. *Id.*

legitimate businesses from the Detroit neighborhoods due to the adult movies was a "secondary" effect<sup>254</sup> of the speech.

While there is some solace in the fact that the *Linmark* opinion did not cite *Young* for the plurality's principle of less protection for erotic speech, or for the concurring opinion's misreading of incidental restrictions, the potential consequences of the primary/secondary distinction are dizzying. A city will surely have no difficulty in finding some attenuated damage to society which can be labeled a "secondary" effect. Why a city should have less power under the first amendment to prevent immediate damage than to prevent subsequent damage caused by free expression is a mystery unexplained by the single paragraph in *Linmark* or the footnote in *Young*, especially when the means of preventing that damage is the same—the direct regulation of the content of the speech itself. Certainly this primary/secondary interpretation of *Young* could not be applied in a principled fashion in a later case without further explication and justification.

## VI. CONCLUSION

The foregoing analysis of the plurality and concurring opinions has proceeded with the conviction that

[t]o disagree with the decisions of the Nixon Court merely because they are conservative instead of liberal is like preferring chocolate to vanilla. More than taste is at issue, however, when evaluating Court opinions. Appellate courts, especially the Supreme Court, are unique because they are the only branch of government obligated to explain what they are doing and why. An opinion representing the views of the highest court must be persuasive in order to merit respect. The quality of reasoning in an opinion measures its result.<sup>255</sup>

It must be concluded that under these standards *Young v. American Mini Theatres* is a jurisprudential mess. Part III of Justice Stevens' opinion demonstrates that "men can[not] have satisfactory relations with each other until they have agreed on certain *ultimata* of belief,"<sup>256</sup> because the plurality opinion undermines some of the most basic precepts underlying the constitutional guarantee of freedom of expression. The first amendment has been read to protect all speech, including that which only a "few of us" would deem worthy of protection.

254. The *Young* footnote, 427 U.S. at 71 n.34, asserted that the Detroit ordinance was directed at the secondary effect—deterioration of the community and the spawning of crime—rather than the dissemination of offensive speech.

255. L. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE*, at xi (1974).

256. Holmes, *The Autocrat of the Breakfast-Table* in *THE AMERICAN TRADITION IN LITERATURE* 821 (S. Bradley, R. Beatty, E. Long, eds. 1967).

First amendment law prior to *Young* has scrupulously prevented decisions requiring nonelected members of the judiciary to define "important" expression.

The woefully inadequate opinion in *Young* can be explained, but not justified, simply by the Justices' distaste for this particular expression. This attitude is evidenced by the comment in the Chief Justice's dissent in *Erznoznik*: "The First Amendment interests involved in this case are trivial at best."<sup>257</sup> This attitude best explains the seemingly inconsistent votes of Chief Justice Burger and Justice Rehnquist in *Hudgens* and *Young*.<sup>258</sup> The reasoning of the two cases is flatly contradictory. Only the result—a denial of first amendment claims—is consistent. It has been said that Justice Stevens "assigns varying degrees of importance to different forms of expression,"<sup>259</sup> and that he "gives short shrift to private interests he considers of small magnitude."<sup>260</sup> Part III of *Young* makes those statements prophetic indeed.

In addition to this insensitivity toward freedom of expression is the disappointing and uncritical deference to municipal zoning laws reflected in the concurring opinion of Justice Powell. Repeating *ad infinitum* that the Detroit ordinance is but an incidental restriction on first amendment rights will not make it so. Justice Powell's attempt to distinguish *Erznoznik* falls pathetically short, and is further weakened by the fact that he authored that opinion.

What these opinions demonstrate is an unwillingness to impose any burden upon society to guarantee freedom for all. Free expression is not without cost. Recognition of this fact does not preclude regulation; there is a necessary trade-off between the costs and benefits of free speech, but the balance which may be struck is limited by the preexisting bias toward freedom of expression embodied in the first amendment. At present, this society is manifesting an increasing intolerance for erotic expression. Magazine publishers, and even actors and actresses, are being prosecuted under local obscenity laws.<sup>261</sup> "In our

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257. 422 U.S. 205, 223 (1975). Justice Rehnquist took a similar view in his dissent in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 790 ("the [first amendment] rights of the appellees seem to me to be marginal at best"). For a sobering analysis of the jurisprudence of Justice Rehnquist, see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

258. See text accompanying note 116 *supra*.

259. *The One Hundred and First Justice: An Analysis of the Opinions of Justice John Paul Stevens, Sitting as Judge on the Seventh Circuit Court of Appeals*, 29 VAND. L. REV. 125, 144 (1976).

260. *Id.* at 195.

261. Time Magazine, Feb. 21, 1977, at 51, col. 2.

country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either."<sup>262</sup> In prior days, the Supreme Court was the chief protector of the imprudent among us.

The Court renounced that role in *Young*, and failed to provide a principled justification for its decision. The Court will not regain that role unless it views laws such as Detroit's anti-skid row ordinance with deep suspicion, and requires a compelling societal interest when the government seeks to restrict protected expression solely on the basis of its content.

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262. The Civil Liberties Review 3:5, at 74 (1976-77) (quoting Samuel Clemens).